THE NEW FEDERAL STATUTE RELATING TO LIENS ON VESSELS.

THE sixty-first Congress just before adjournment passed an act of great importance to the ship-furnishing and ship-owning interests of the country, and one which ought to be welcomed by the admiralty bar; for it is believed that this law will work a vast improvement in the practice of an important branch of the maritime jurisprudence of the United States. The act referred to is entitled, "An Act Relating to Liens on Vessels for Repairs, Supplies, or Other Necessaries," and was signed by the President June 23, 1910.

Much has been accomplished of late in furtherance of uniform legislation by the several states on branches of the law dealing with questions arising in commercial transactions, and where uniformity is most needed, such as the law of sales and the law of negotiable instruments. In this way one of the disadvantages of our system of government by a federation of sovereign states is being avoided. But not alone in the field of the common law has the want of uniformity been manifest. For years the law of the United States relating to liens on vessels for necessaries existed in a state of almost hopeless confusion, the result of misconceived and conflicting precedents and the provisions of the varying state statutes dealing with "domestic" vessels, so called. Believing that reform could best be secured by means of an act of Congress, which body, indeed, alone possessed the authority to treat of certain features of the law, the Maritime Law Association of the United States, at its annual meeting in May, 1908, appointed a committee to draft a measure upon the subject which Congress should be asked to enact. A bill was adopted by the Association which subsequently received the indorsement of the American Bar Association and the support of many ship-owning and ship-furnishing interests as a much-needed attempt to simplify the law and to make it uniform throughout the country. And Congress so far approved the undertaking as to pass the bill, with but one slight amendment hereafter referred to. The law thus enacted is the subject of this article.

As a preliminary to a discussion of the Act, some review of the state of the law is necessary. The writer treated of the matter at length in an article which appeared in a former number of this Review.[1] For present purposes it is sufficient to say that the most conspicuous sources of confusion in the American law were (1) the division of vessels into two classes with respect to necessaries, namely, "foreign" and "domestic" vessels; and (2) the doctrine of presumption of credit to the owner.

The division of ships into two classes in lien cases was the result of the decision of the Supreme Court of the United States in The General Smith,[2] decided in 1819. There it was held that when necessaries were furnished a ship in a port of a state to which she did not belong, a lien was given by the general maritime law, but that when necessaries were furnished in a port or state to which the ship did belong, the case was governed by the municipal law of the state, and that no lien was implied unless recognized by that law. This ruling was contrary to the law of continental Europe (which takes no account of the domicile of the vessel) and to the theory, if not the practice, of the law of the admiralty courts of Great Britain, and was soon recognized to be a mistake, though just how the mistake happened to be made is not quite clear, for the opinion in the leading case is short and devoid of citations. Various explanations have been offered. In the first place it is to be noted that on the Continent there is little, if any, distinction between the municipal law and the maritime law. Mr. Justice Brown characterized the decision in The General Smith as "a relic of the prohibitions of Westminster Hall against the Court of Admiralty,"[3] from the fact that the English admiralty courts assumed to recognize the right of a materialman to proceed against the vessel for necessaries furnished in England, but were prevented from taking jurisdiction of such claims by the common-law judges.[4] Judge F. C. Lowell accordingly explained the error as due to Story's failure to perceive clearly the "difference between jurisdiction and substantive law."[5] In a paper read before the American Bar Association in 1908, Mr. Edgar H. Farrar said that the rule of the civil

[1] 21 HARV. L. REV. 332.

[2] 4 Wheat. (U. S.) 438.

[3] The Roanoke, 189 U. S. 185, 194.

[4] See The Champion, Brown, Adm. 520, 531; The Zodiac, 1 Hagg. Adm. 321, 325; 2 Parsons, Shipp. & Adm., 322.

[5] The Underwriter, 119 Fed. 713, 740, 742; and *cf.* 1 Bell, Com. 527.

law which gives a lien on both foreign and domestic vessels "was never admitted in England," and that therefore the decision in The General Smith differed from the English as well as the Continental law and jurisdiction.[6] The origin of the mistake is perhaps not important, but the insistence upon the ruling by the Supreme Court of the United States was of grave consequence to the American admiralty law.

The decision in The General Smith left it to be determined by the law of each state whether a lien should be implied for necessaries furnished a vessel of the state. In Peyroux *v.* Howard [7] the Supreme Court sustained the lien given by the Civil Code of Louisiana, and the common-law states of the country were not slow in passing statutes conferring liens for supplies furnished by resident materialmen. These statutes were upheld in the case of domestic vessels, and an anomalous situation was created, which resulted in much confusion. The "home state" in which the vessel was said to be "domestic" was identified with the state of ownership; in the ports of every other state, even of other states of the Union, the ship being regarded as a "foreign" vessel. This division was in itself artificial, for the states as such have no vessels. All American vessels are vessels of the United States, and no American vessel is in a foreign port when in a port of the United States.[8] Further, the absence of any requirement in the statutes of the United States that the owners of an American vessel should live in the same state made it difficult in many cases to decide for the purpose of liens for necessaries just what state was the "home" state of the vessel. Some courts were led to intimate that a vessel might have more than one home state, or, at least, be "domestic" in more than one state;[9] and Mr. Justice Johnson once described home port as "an epithet which, it is very easy to perceive, has no necessary reference to State or other limits."[10] Finally, the most conspicuous anomaly which the recognition of the state laws introduced into our practice was that the lien, although conferred by a state statute,

[6] The Extension of the Admiralty Jurisdiction by Judicial Interpretation, 33 Reports Amer. Bar Assoc. 479.

[7] 7 Pet. (U. S.) 324.

[8] Benedict, The American Admiralty, 3 ed., sec. 273.

[9] The Rapid Transit, 11 Fed. 322, 329–330; Stephenson *v.* The Francis, 21 Fed. 715, 717, 718.

[10] The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 417.

could be enforced in the federal courts alone, inasmuch as, the subject matter being maritime, it came within the exclusive grant of the admiralty and maritime jurisdiction, by the Constitution, to the national courts.[11]

Another result of The General Smith was that a great and unnecessary burden was placed upon the federal courts; for the state statutes varied greatly in their scope and phraseology, and the task of construing them uniformly proved very difficult. Indeed the burden was found so great that in 1858 the Supreme Court amended the Twelfth Admiralty Rule by taking away the right to proceed *in rem* in the case of domestic vessels, and Taney, C. J., declared, in explanation of the change, that the duty of interpreting and enforcing the state statutes was "entirely alien to the purposes for which the admiralty power was created." [12]

The doctrine of presumption of credit to the owner was promulgated in the case of The St. Jago de Cuba,[13] in which Johnson, J., said (1) that it was not in the power of anyone except the master to give implied liens on a vessel, and (2) that when the owner was present the contract was inferred to be made on his ordinary responsibility, without a view to the vessel as the fund from which compensation was to be derived. Like the ruling in The General Smith, the doctrine of The St. Jago de Cuba seems to have had no counterpart in the law of Europe. It was, however, retained in the American law, at least in the case of contracts made by the owner in person, the accuracy of the first proposition of Johnson, J., being questioned by Mr. Justice Clifford in The Kalorama,[14] and the law in effect restated by the court in The Valencia,[15] where it was said that "in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person" carried with it no claim upon the *res*.[16]

While no difficulty resulted from the enforcement of this rule where necessaries were ordered by the owner in a foreign port, much

[11] The Glide, 167 U. S. 606.

[12] The St. Lawrence, 1 Black (U. S.) 522, 530–531.

[13] 9 Wheat. (U. S.) 409, 416, 417 (1824).

[14] 10 Wall. (U. S.) 204, 214, 215.

[15] 165 U. S. 264, 270, 271.

[16] *Cf.* The Rapid Transit, 11 Fed. 322, 329, where Hammond, J., says, speaking of the owner, "his mere presence would not perhaps avoid the lien, but if he buy the supplies and be of credit and have the opportunity to give his own security . . . there is no *implied* lien."

confusion arose over the question as to whether or not "an agreement, express or implied," was essential to the establishment of a lien in the case of necessaries ordered by the owner in a home port. Some courts, following the *dictum* of the Circuit Court of Appeals for the Sixth Circuit, in The Samuel Marshall,[17] an opinion written by Judge Taft, held that some evidence that the vessel was credited was necessary to support the lien, notwithstanding the state law.[18] Other courts took the position that this interpretation defeated the very object of the local statutes, which was to confer a lien in the state where the owner was always assumed to be present.[19] In The Iris[20] it was held by the Circuit Court of Appeals for the First Circuit that under the Massachusetts statute there was no necessity of either alleging or providing that credit was given the vessel by mutual agreement. An attempt was made in this case to bring the question to the attention of the Supreme Court, but the court refused to entertain a writ of *certiorari*,[21] with the result that a sharp conflict of authority continued to exist among the lower federal courts.[22] The decision in The Iris was construed as standing for the proposition that state statutes silent upon the subject of credit created a conclusive presumption of credit to the vessel and a consequent lien.[23] In The Vigilant[24] the Circuit Court of Appeals for the Third Circuit took a middle ground, holding that in such cases the necessaries ordered were presumed to be on the credit of the vessel unless the contrary was shown, a view which seems to accord with the theory of the French law. Thus, Émérigon says, speaking of a claim for the construction of a vessel (which under the Continental law is treated in this respect like a claim for necessaries), that the debt is privileged unless it be shown that the materialman "trusted the person and not the thing."[25]

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[17] 54 Fed. 396.

[18] See Lighters Nos. 27 & 28, 57 Fed. 664 (C. C. A., 9th Cir.); The Electron, 74 Fed. 689 (C. C. A., 2d Cir.); and *cf.* The Advance, 60 Fed. 766; The Westover, 76 Fed. 381; The Sappho, 89 Fed. 366.

[19] The Alvira, 63 Fed. 144; The Illinois, White & Cheek, 2 Flipp. (U. S.) 383; The Iris, 100 Fed. 104 (C. C. A., 1st Cir.); The Vigilant, 151 Fed. 747 (C. C. A., 3d Cir.).

[20] 100 Fed. 104, 110–112.

[21] Woodworth *v.* Nute, 179 U. S. 682.

[22] *Cf.* The Golden Rod, 151 Fed. 8.

[23] The City of Camden, 147 Fed. 847, 849.

[24] 151 Fed. 747, 750, 753.

[25] 2 Émérigon, Traité des Assurances et des Contrats à la Grosse, Boulay-Paty ed. c. xii, sec. 111; Benedict, Adm., 144.

To meet the situation thus outlined the present federal statute was framed. How it meets the situation and what the Act attempts to accomplish, it is the purpose of this article to explain.

The text of the Act follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

SEC. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

SEC. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

SEC. 4. That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

SEC. 5. That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

It will at once be observed that, generally speaking, the Act does three things: (1) It does away with the artificial distinction between foreign and domestic vessels in the matter of liens for necessaries;

(2) removes the presumption of credit to the owner; and (3) supersedes the state statutes in so far as they confer liens for supplies, repairs, and other necessaries.

The last result is accomplished by section 5 of the Act. As originally worded, this section read:

"That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action against vessels for repairs, supplies, and other necessaries."

The words "to be enforced by proceedings in rem" were added in the Senate because of the fear, expressed by some members of the Judiciary Committee, that otherwise the Act might be construed to prevent the attachment of a vessel in a suit against the owner in a state court. Needless to say it was not intended that the Act should have this effect, and it is believed that the section in question could not be construed to have any such effect. The Act deals with maritime liens, enforceable by proceedings *in rem*. A right of action against a vessel is a right *in rem*. A claim against the owner is in no sense a right *in rem*, and the mere fact that the vessel is attached as collateral security does not make the cause an action *in rem*. Further, section 4 expressly provides that the right to proceed *in personam* shall not be construed to be affected by the new law. And the judiciary act which conferred upon the district courts of the United States jurisdiction of admiralty and maritime causes contained the following reservation: "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." Says Mr. Justice Clifford in The Belfast,[26] in explanation of the reservation:

"Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the State courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction in his case."

A striking illustration of this separation of rights at common law and rights in admiralty is to be found in the case of Leon *v.* Gal-

[26] 7 Wall. (U. S.) 624, 644.

ceran,[27] where an action against the owner by seamen suing for their wages in a state court, with an attachment of the vessel under the state law, was sustained by the Supreme Court of the United States. Out of an abundance of precaution, however, the amendment of the fifth section was made, and for the sole purpose of making it certain that the section should not be construed to vitiate the right of attachment granted by the states in suits at common law.

The distinction between foreign and domestic vessels in the matter of liens for necessaries is avoided by section 1 of the Act which provides that the lien shall exist whether the vessel be foreign or domestic, and puts upon the same footing necessaries furnished in the home state of the vessel and necessaries furnished in a foreign port or state. The first section also removes the presumption of credit to the owner in the case of contracts made by him, and simplifies the law by making the lien depend upon a contract by the furnisher with one in authority to bind the vessel for necessaries. The owner is primarily the person to lien the vessel, and those presumed to have this authority in addition to the owner are designated in section 2. In so far as the persons thus enumerated are concerned the Act makes little if any change in the law. Further, it is provided in the first section, in an attempt to do away with all confusion about credits in the future, that no allegation or proof that the vessel was credited shall be required in order to sustain the lien. Except as called for by the ruling in The Valencia,[28] in the case of necessaries ordered by the owner in person, the element of credit to the ship was never, practically speaking, of much consequence. The crediting and pledging of the vessel was a fiction and nothing more. Indeed, the lien was termed an implied lien, and it was held in one case[29] that the "express or implied" agreement for a lien required by The Valencia did not serve to create a lien *de novo*, but only to rebut the presumption that the owner alone was credited. Inasmuch, therefore, as the new statute undertook to do away with the distinction between domestic and foreign ports and with the presumption once said to attach to the owner's presence in any port, the requirement of proof that the vessel was credited seemed unnecessary, and, if retained, more apt to continue the confusion which it was the express purpose of the Act

[27] 11 Wall. (U. S.) 185. [28] 165 U. S. 264, 271. [29] The Ella, 84 Fed. 471.

to avoid. The furnisher credited the vessel in the past, so far as he understood the requirement, by charging the necessaries to the vessel and believing in consequence that he was secured. Doubtless he will continue to enter his charges against the vessel in the future.

The last provision of the first section does not mean, however, that the lien shall exist *regardless* of the question of credit. Although the reforms in the law are accomplished largely by the first section, the Act must be read as a whole and section 4 provides that nothing in the Act shall be construed to prevent a furnisher from waiving his right to a lien at any time "by agreement or otherwise." The effect of the law, therefore, is to say that when necessaries are furnished a vessel upon the order of one in authority to procure them, they shall be presumed to be on the credit of the vessel, and that a lien shall exist therefor, — an implied hypothecation which may be enforced by a proceeding *in rem*. The furnisher may surrender his claim on the *res* affirmatively, or he may lose it by laches in the enforcement of the claim. But the burden is upon the person disputing the lien to show that the same has been waived. And unless it be shown that it was understood or agreed between furnisher and orderer that the vessel should not be held responsible, the credit of the vessel is implied by the law, and a valid claim against the vessel established which the furnisher may enforce if he proceed with diligence. The theory of the Act in this respect is similar to that of Judge Gray in his construction of the Pennsylvania statute in The Vigilant,[30] which statute the learned judge interpreted to mean that supplies ordered by the persons designated "are presumed to be on the credit of the vessel (unless the contrary is shown)." Speaking of the lien conferred he said, "Of course, like any other privilege or advantage given by law, it can be waived, and *an understanding between the parties, that no such lien is contemplated*, would be effective for that purpose." And again, "The burden, therefore, of showing an express repudiation of such a pledge known to the one who claims the lien rests upon him who undertakes to rebut its implication." This construction introduces no new theory into the maritime law of America, but merely applies to the case of necessaries ordered by the persons designated, and in all ports, the familiar rule of the general law in the case of con-

[30] 151 Fed. 747, 753.

tracts by the master when in a foreign port. In such cases it was a presumption of law that the necessaries were furnished on the credit of the ship, and proof was not required of any "express pledge," "special agreement," or "stipulation" to that effect.[31]

The persons enumerated in section 2 in whom authority to bind the vessel for necessaries is to be presumed are the agents who would ordinarily act for the vessel in fitting her out and maintaining her in condition. The clause, "or any person to whom the management of the vessel at the port of supplies is intrusted" is doubtless an elastic one. Supplies furnished to a vessel in Boston upon the order of the ship's New York agent would seem to be furnished upon the order of the person to whom the management of the vessel at the "port of supply" is intrusted in the absence of an authorized agent of the vessel at Boston. Section 2, like the first section, is not to be read alone, and must be construed in connection with the third section. When thus construed, it will be observed that although authority to bind the vessel is presumed in the case of certain officers and agents, the owner is not precluded by the Act from restricting the authority of any officer or agent, whether one of the designated few or not; and if the furnisher know that for "any reason" the person ordering the necessaries is without authority to bind the vessel, no lien arises. This brings the law into accord with the conduct of the modern business of shipping. On the larger lines the master now has very little to do with the furnishing of the vessel, even when in a foreign port, this duty being attended to by an agent on shore, or by some other officer of the ship or of the company that owns it. In this particular, furthermore, the Act does no violence to the maritime law. Even in the case of necessaries ordered by the master in a foreign port no lien was implied if the master had funds or credit which he could use to meet the expenses incurred, and the possession of such funds or credit by the master was known to the furnisher or if he ought to have known of them.[32] For the law has never assisted a ship's agent to practice a fraud upon the owner. The Act does not mean, nevertheless, that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the

[31] The Emily Souder, 17 Wall. (U. S.) 666, 670–671; The Eliza Jane, 1 Sprague (U. S.) 152, 153.

[32] The Kate, 164 U. S. 458, 467 *et seq.* and cases cited.

second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their powers, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. Just what circumstances shall be said to give rise to a doubt or to put the furnisher upon inquiry must be left to the courts to decide, as the cases come before them. But the furnisher must not be denied the benefit of the presumption for trivial circumstances. The question is largely one of his good faith, and the law does not require of him more than a reasonable inquiry. If the furnisher make an honest effort, through readily available channels, to ascertain the authority of the orderer in cases calling for an inquiry, he would seem to have satisfied the law. And if such inquiry fail to disclose absence of authority the lien will attach by virtue of the presumption. For it is only when the furnisher "*could have ascertained*" by the exercise of reasonable diligence that the orderer in fact had no authority that no lien is created. If, however, the officer or agent is unlawfully in possession or charge of the vessel, no lien arises, notwithstanding the presumption.

Section 3 states further the law relating to necessaries furnished chartered vessels and vessels operated by a person other than the real owner in respect of which there was previously some conflict of opinion.[33] No distinction is now made between a charterer and an agreed purchaser in possession of the vessel in so far as the contracts of the officers and agents presumed to have authority to bind the vessel are concerned. The furnisher acquires a lien when dealing with them unless he knows that their authority is restricted by the terms of the charter or agreement for sale of the vessel, or, in the words of the Act, "by the exercise of reasonable diligence could have ascertained" that they were without authority to bind the vessel. The phrase quoted is one of three used by Mr. Justice

[33] *Cf.* The India, 16 Fed. 262; The Lime Rock, 49 Fed. 383, 384 (charterer); The Garonne, 160 Fed. 847 (owner *pro hac vice*). *Contra*, The H. C. Grady, 87 Fed. 232, 239 (agreed purchaser); The Iris, 100 Fed. 104 (agreed purchaser under state statute), and see Professor Hughes' article on Maritime Liens, 26 Cyc. 781–782.

Harlan in two cases where there was a charter limitation, the statements being so made by the court as to be treated as synonymous expressions. In the first of these cases, The Kate,[34] the court denied the lien because they were of the opinion that

"the libellant knew or under the circumstances is to be charged with knowledge that the charter-party under which the Kate was operated obliged the charterer to provide and pay for all the coal needed by that vessel."

And in The Valencia,[35] the same court said that the furnisher acquired no lien

"if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry and chose to act on a mere belief that the vessel would be liable for his claim."

The phrase, "knew, or by the exercise of reasonable diligence, could have ascertained," is adopted from The Kate,[36] and was used in the Act of Congress to make it clear that if the furnisher know of the existence of a charter-party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost.[37]

With respect to advances, the law is left as it was.[38] To entitle the lender to proceed against the *res*, the advances must be made on the credit of the ship to pay claims which are in themselves liens and must actually be used to satisfy such claims.[39] And "such

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[34] 164 U. S. 458, 465. [35] 165 U. S. 264, 272, 273. [36] 164 U. S. 458, 470.

[37] In The Underwriter, 119 Fed. 713, 764, Judge F. C. Lowell seemed to infer that another rule might obtain if the supplies were furnished in a "port of distress." Whether this would be so under the new Act may be questioned, especially when it is considered how readily the owner can be communicated with, under modern conditions, from all points of the world. Whether a charterer who has control and possession of a vessel under a charter-party requiring him at his own cost to provide for necessaries may, under any circumstances, pledge the credit of the vessel, was a point expressly reserved by the court in The Valencia, 165 U. S. 264, 272.

[38] Sec. 4.

[39] The Guiding Star, 18 Fed. 263; The Wyoming, 36 Fed. 493; The City of Camden, 147 Fed. 847; The George W. Anderson, 161 Fed. 760; The Emma B., 162 Fed. 966; The Avalon, 169 Fed. 696.

an advance not made on authority of one having the right to bind the ship does not give a lien." [40]

No statement or notice of the lien is required by the Act as a condition precedent to the creation of the lien, and the Act stipulates no period of limitation within which the lien shall be deemed to continue. In these respects the federal statute accords with the general maritime law as heretofore administered in the case of foreign vessels, and a change is made in the law relating to necessaries furnished domestic vessels, since most of the state statutes required some sort of claim to be filed in a designated registry. This requirement was annoying to ship-furnishers and offensive to ship-owners who disliked to have their vessels incumbered with a long list of claims for necessaries of all kinds. The only persons who might be said to have received a benefit from the practice were prospective purchasers of the vessel, for furnishers seldom examined the registry, and any examination would reveal only claims for necessaries furnished in the home state, which, as a matter of fact, might represent but a small percentage of the liens on the vessel. Assuming some publication of liens for necessaries to be desirable, the question arises, where and how shall it be made? Registry at a single place, as for instance the city of Washington, would, in a country as large as the United States, be, practically speaking, of little value. The home port of the vessel (even if known) would not necessarily be accessible to all interests as a place of public record, and the port of supply is open to still greater objections. Furthermore, so many registries would be required in the case of the last suggestions as to defeat the adoption of either. Some adaptation of the Italian practice which requires the lien to be entered on the ship's register or sea letter, which is carried on board the vessel, would seem to be as feasible a scheme as could be made use of in this country; but the lack of enthusiasm among ship-owners and ship-furnishers for any provision as to the recording of the lien and the difficulty of deciding upon any particular plan led to the abandonment of all provisions as to registry in the Act which is now the law of the land.

It is doubtful, moreover, if prospective purchasers are likely to suffer any detriment because of the absence of a requirement that a claim of lien shall be recorded. Section 4 says that the Act shall

[40] Hughes, Maritime Liens, 26 Cyc. 764–765.

not affect the law relating to laches. In determining whether or not a lien has become stale, a most important consideration is the existence of the claims of third parties which have come into being during the period when the lien claimant could have enforced his claim against the vessel, and of these intervening rights perhaps the most important are those of *bonâ fide* purchasers of the vessel.[41] The doctrine of laches as administered by the courts has worked well in the case of liens conferred by the general maritime law, and it was felt that the ends of justice would be better served if in place of a fixed period of limitation in the new statute the doctrine of laches were made applicable to all liens for necessaries. Any limitation to be just must have some exception, to provide for the case where the furnisher is unable to proceed against the vessel during the stated period, notwithstanding the exercise of reasonable diligence on his part. In some cases it would be unjust to allow a lien to be enforced, even if the established period during which the lien was to continue had some time to run. On the whole, therefore, it was deemed wisest to leave the matter of the continuance of the lien to the courts, and it is believed that the result will be the most desirable one of causing lien claimants to enforce their claims with diligence.

We have been speaking of the provisions of the new Act. It is now pertinent to inquire just what claims are embraced by the Act. The title and some of the phraseology of the federal statute are taken from the Twelfth Admiralty Rule of the Supreme Court, which rule relates to "suits by materialmen for supplies or repairs or other necessaries." In the classic language of Sir Leoline Jenkins,[42] "Those are commonly called materialmen whose trade it is to build, repair or equip ships or to furnish them with tackle and provision (necessary in any kind)." The word "necessary" in this connection has never been construed in this country to mean what is absolutely essential to the needs of the ship, but rather what is fit and proper for the vessel and what a prudent owner would order.[43] On the other hand, "necessaries" have not been taken to comprehend all the services that a ship may require.[44] As used in the

[41] See Hughes, Handbook of Admiralty Law, 94, 95.

[42] Quoted by Sir John Nicholl in The Neptune, 3 Hagg. Adm. 129, 142.

[43] The Grapeshot, 9 Wall. (U. S.) 129.

[44] See Hughes, Adm. Law, 96–97.

Twelfth Rule the term "other necessaries" would seem to mean other *like* necessaries, and to embrace "necessary" materials, furnishings, fittings, and appliances of all kinds appropriate to the vessel. In the new statute the term is made to include specifically "the use of dry dock or marine railway," an addition to the Act which some parties have thought to be unfortunate. It is therefore worth while to consider what effect the insertion of these words has upon the meaning of the word "necessaries" and the scope of the law. If the use of a dry dock or a marine railway is a necessary, then why not the use of a dock or wharf; and if dockage and wharfage come within the scope of the Act, do other services that may be rendered to a ship?

In a case decided in 1871,[45] and before the Twelfth Rule was amended for the second time so as to provide once more for the enforcement of liens on domestic vessels, Benedict, J., was called upon to decide whether an action *in rem* could be maintained for "wharfage" furnished to a domestic vessel. In his opinion the learned judge stated that he had "failed to discover in the maritime law any general distinction between foreign and domestic vessels in respect to demands like this." The doctrine of The General Smith, he observed, had been applied by the Supreme Court only to the contracts of materialmen, ought not to be extended to other contracts, and a wharfinger was not a materialman. He accordingly allowed the lien notwithstanding the fact that the rule of practice then in existence made no provision for actions against domestic vessels. The case of *Ex parte* Easton, decided by the Supreme Court in 1877, made it questionable whether a lien arose for wharfage furnished in the home state.[46] But Judge Benedict's view of the nature of the service was acquiesced in by Addison Brown, J., in The Allianca,[47] in which case that learned judge remarked that "a wharfage service, as respects immediate need, and the absence of opportunity for personal dealing or inquiry, is most analogous to towage, pilotage, or salvage, which, aside from statute, give a lien on domestic vessels." It will be noted, however, that the language used by the court is somewhat guarded, and in a later case the same judge referred to the decision of Benedict, J., as establishing the proposition that a maritime lien

[45] The Canal Boat, "Kate Tremaine," 5 Ben. (U. S.) 60.
[46] 95 U. S. 68, 75.
[47] 56 Fed. 609, 613.

exists for wharfage furnished to a domestic vessel "when the wharfage is obtained in the ordinary course of navigation, on the engagement of the master or officers of the ship."[48] In the second case Brown, J., found that the wharfage was not furnished in the ordinary course of navigation or upon the request of an officer of the ship, but in accordance with the terms of an unsigned memorandum of agreement previously drawn up between the libellant and the president of the steamship company. "In all cases," says the Court (citing The Samuel Marshall[49]), "to sustain a maritime lien there must be either in fact or by presumption of law a credit of the ship; and whenever such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized." The lien was denied for two reasons: (1) because the contract embraced other valuable considerations, the supply of which would give no lien upon the ship; and (2)

"because the evidence indicates beyond doubt, as it seems to me, that the dealings were upon a personal contract between the two companies which did not look to any credit of the ship, but only to the personal responsibility of the steamship company."

The dismissal of the case was well justified by the finding that the agreement "embraced considerably more than ordinary wharfage rights," and there was abundant evidence that the services were not furnished on the credit of the vessels concerned. But the language of the court, taken in connection with the citation of The Samuel Marshall, seems to infer that in the case of contracts made by the owner in person, the law as to wharfage is like the law governing supplies and repairs, which, if true, furnishes a reason why the former service should be held to be covered by the Act of Congress in order that there may be uniformity with respect to the element of credit, when the owner is a contracting party. And wharfage would clearly appear to be brought within the scope of the Act by the specific enumeration among "other necessaries" of the use of a dry dock. Indeed in The George W. Elder,[50] the District Court of Oregon sustained a lien for "dry dockage" under a state statute creating liens on domestic vessels for supplies, materials, and "wharfage," thus indicating that the services were regarded as kindred in character.

[48] The Advance, 60 Fed. 766–767. [49] 54 Fed. 396, 403. [50] 159 Fed. 1005.

Does the list of "other necessaries" end with wharfage? At the hearings on the Act before the Committees of Congress the request was made that "towage" be added after the word "including" in the first section, because of the reference to dry docks and marine railways, and because of the fact that there seemed to be some question whether a lien arose for towage ordered by the owner.[51] This amendment was regarded by the sponsors of the Act as uncalled for and as undertaking to insert in the Act something foreign to the subject matter of the Act. The House of Representatives did not add the word "towage," and the matter was dropped in the Senate with the suggestion that the Senate Committee state in its report that towage was not enumerated because deemed to be covered by "necessaries." [52] No such statement was made in the Committee's report, and there is, therefore, some doubt as to the scope of the federal statute in this particular. The necessity that the law should be clearly understood is, however, quite as great in the case of "towage" as in that of "wharfage," for in The Daniel Kaine [53] the District Court for the Western District of Pennsylvania went so far as to say that the general maritime law gives no lien for towage rendered at the home port of the tow. This decision we believe to be erroneous and a misapplication of a doctrine relating to contracts for supplies, repairs, and similar necessaries alone. Whatever may be thought about "wharfage" it is submitted that "towage" stands upon a different footing than "necessaries," and belongs in the class of "services" with salvage, for which a lien is conferred by the maritime law without particular regard to the contract, express or implied, made for them. This distinction between supplies and repairs on the one hand, and services like salvage on the other, is well stated by the Circuit Court of Appeals for the Third Circuit in the case of The Alligator.[54] Says George Gray, J., in that case:

"There are maritime services which are usually rendered under circumstances which make them so essential to the movement of a vessel, and to the performance of her primary function, as an instrument of commerce, that the admiralty law presumes they are rendered on the

[51] *Cf.* The Columbus, 67 Fed. 553.

[52] See the printed minutes of the hearing before the Sub-Committee of the Senate Committee on the Judiciary, pp. 6, 7.

[53] 31 Fed. 746.

[54] 161 Fed. 37, 40, 41.

credit of the vessel, in the absence of proof to the contrary, and creates a maritime lien in their favor, independently of the question whether it be a domestic vessel, or not. Notable examples are the lien for pilotage services, the lien for seamen's wages, for towage services and for salvage services. The reasons for the rule in these cases are obvious, and arise out of the necessities of the situation. . . . The peculiar exigency of the situation in all these cases, supplies the reason for the rule of presumption of lien, as it has been long recognized in the administration of the general admiralty law. The exigency for such services, as are above enumerated, so generally exists, that the rule of presumption of lien is sometimes dissociated from the reason upon which it is founded. . . . So a towage service as ordinarily performed is a maritime service, which from the peculiar situation of the parties and of the circumstances of necessity surrounding it, and in the absence of proof to the contrary, creates a presumption of credit given to the vessel and a consequent lien."

Since The Daniel Kaine[55] was decided by an inferior court of the same circuit it may be assumed to be overruled by the opinion quoted above.[56] On principle the lien for towage would seem to depend upon the character of the service rendered, without relation to the identity of the person giving the order, and whether ordered in the home port of the tow or in some other port, unless it can be shown that the circumstances were such as to indicate an understanding that the tow was not to be bound for the services rendered. Under this view it is really not important whether towage is to be construed to be covered by the Act or not, and we believe the same to be true of wharfage, although wharfage seems to be included as a necessary, for the reasons that have been set forth.

We are now led to inquire what effect the new statute is to have upon contracts for a season. In Diefenthal *v.* Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft[57] it was held by the District Court for the Eastern District of Louisiana that an agreement with the owners to supply their vessels for a definite period and at a fixed price with all the provisions they might require was not a maritime contract. But this is a view which has not been taken of all such contracts, and the lien has been denied because the court was unable to find that the contract was made on the credit of the vessel.[58]

[55] 31 Fed. 746. [56] But see The Enterprise, 181 Fed. 746, 748.

[57] 46 Fed. 397; appeal dismissed, 159 U. S. 251.

[58] See Cuddy *v.* Clement, 113 Fed. 454; Whitcomb *v.* Metropolitan Coal Co., 122 Fed. 941. A written lease of a wharf has, however, been held not to be a maritime

Assuming contracts for a season to be maritime, a lien cannot be defeated under the Act of Congress for the sole reason that the agreement was made with the owner. And unless the lien is subsequently waived it must appear from the contract itself that the credit of the owner alone was contemplated. This we believe to be true also of towage services under the general maritime law. When towage claims have been dismissed by the courts in cases involving a season contract, it has been because the contract showed that the credit of the owner was relied upon,[59] or because of other reasons than the mere fact that the owner was a contracting party.[60] As in the case of supplies and repairs no lien exists for towage rendered several vessels as a plant or without reference to any particular vessel.[61] And under the federal statute, as under the general maritime law, the things furnished must at least be "appropriated" to the use of a designated vessel.[62] For there can be no claim upon a given *res* unless it be shown that the necessaries (or services) were furnished specifically to that *res*. This is a most important consideration in the case of contracts for a season in which more than one vessel is concerned.[63]

The Act of Congress is perhaps open to criticism for not defining the meaning of the term "furnish." That an explicit definition of this word would be beneficial may be admitted, for there is at present a conflict of authority upon the subject. Thus it is set forth in some cases that no lien can exist unless the supplies and repairs are actually used by or incorporated in the vessel;[64] while others do not lay down so strict a rule.[65] But the difficulty of determining just where the line should be drawn led to the omission of any definition in the law, and the courts, as heretofore, must decide

contract. The James T. Furber, 129 Fed. 808. *Cf.* The Cimbria, 156 Fed. 378, 384–385.

[59] The Canal Boat J. M. Welsh, 8 Ben. (U. S.) 211; The Saratoga, 100 Fed. 480, 482.

[60] The Alligator, 161 Fed. 37. *Cf.* The Columbus, 67 Fed. 553, 556, in the same circuit.

[61] The Columbus, 67 Fed. 553; The Saratoga, 100 Fed. 480.

[62] *Cf.* Sewall *v.* The Hull of a New Ship, 1 Ware (U. S.) 565.

[63] The Alligator, 161 Fed. 37.

[64] The Cabarga, 3 Blatchf. (U. S.) 75; The Daniel Kaine, 31 Fed. 746, 748.

[65] The James H. Prentice, 36 Fed. 777. *Cf.* Aitchenson *v.* The Endless Chain Dredge, 40 Fed. 253, 254, where the court, Hughes, J., said: "It is her contract for the materials which binds her, without any reference to the delivery or non-delivery of the articles bargained for."

upon the facts in each particular case. The view of Addison Brown, J., in The Vigilancia,[66] seems to be the one now most generally recognized, namely, that

"There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship or else are brought within the immediate presence or control of the officers of the ship."

Too much must not be expected of the federal statute. First attempts at remedial legislation are not always successful, and the situation with which the Act in question had to deal was a most difficult one. It is believed that the Act meets the situation in a simple and direct manner and that it furnishes a logical solution of the difficulties which developed in the law. Neither ship-owner nor ship-furnisher is burdened unduly and a closer approach to the Continental law is brought about than has ever existed in this country. Uniformity in the maritime law of the nations is a desirable object, and the superiority of the codes of the civil-law nations of the world in the matter of liens for necessaries has long been recognized.

The new Act was passed as a regulation of the maritime law of the United States, something which the Supreme Court has many times asserted that Congress had the right to do.[67] It does not extend the maritime and admiralty jurisdiction of the United States beyond what the Supreme Court has stated to be the true limits of that jurisdiction, something which the Supreme Court has declared that neither the states nor Congress could do.[68] That a contract for necessaries is maritime, even when made in the home port, was admitted in The General Smith.[69] The power to regulate the admiralty and maritime jurisdiction of the United States rests with Congress alone. The state statutes dealing with liens for necessaries have been enforced in the absence of congressional legislation, the situation in this respect being much like the state pilotage laws, — to be enforced until Congress acts.[70] And it has long been

[66] 58 Fed. 698–700.

[67] See *In re* Garnett, 141 U. S. 1, 14; Butler *v.* Boston S. S. Co., 130 U. S. 527, 556; The Lottawanna, 21 Wall. (U. S.) 558, 577, 581, and *cf.* The Chusan, 2 Story (U. S.) 456.

[68] *Cf.* the cases cited *supra.*

[69] See 4 Wheat. (U. S.) 438.

[70] The Lottawanna, *supra*, 581. *Cf. Ex parte* McNeil, 13 Wall. (U. S.) 236; *Ex parte* Hagar, 104 U. S. 520.

assumed that Congress would some day pass a law affecting the subject of liens for necessaries.[71]

It is unfortunate that Congress cannot legislate to supersede the provisions of the state statutes conferring liens for the construction of a vessel, but so long as the Supreme Court maintains the view that a contract to build a ship is not maritime, which view it has recently reiterated,[72] the constitutional power to make the change does not appear to exist. There are, however, some remaining features of the state laws relating to liens on vessels which might well be eradicated, for not a few of the state statutes have undertaken to provide liens, not only for necessaries, but for many other claims known to the maritime law. In so far as these statutes attempt to confer a lien when one is already given by the general maritime law, they are, strictly speaking, of no effect. And when they attempt to extend the jurisdiction of the maritime law beyond the limits fixed by the Supreme Court they are unconstitutional under the decision in The Roanoke.[73]

The common misunderstanding of the scope of state authority in this particular is well illustrated by the recent decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Mack S. S. Co. *v.* Thompson.[74] In that case a vessel had been substantially completed by her builders but had not been delivered, although she was paid for and a bill of sale had been given to the owners. The vessel was lying at the dock of the shipbuilding company, waiting for certain fittings which the builder had contracted to supply. Inasmuch as the river on which the company's works were situated was a small stream, likely to be swollen by spring freshets and made dangerous, the company suggested that the vessel be moved to a safer place. To this the owners agreed, and the shipbuilding company procured the tugs of the libellant to move the vessel. The towing bill not being paid, the towing company proceeded against the ship for the services rendered. In the lower court there was a decree for the libellant, from which the claimant appealed, contending in the first place that there was no admiralty jurisdiction, and in the second place that the towage

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[71] *Cf.* Bradley, J., in The Lottawanna, *supra*, 581, 582.

[72] The Winnebago, 205 U. S. 354.

[73] 189 U. S. 185.

[74] 176 Fed. 499.

was done for the shipbuilding company. Says Severens, J., writing the opinion of the Court of Appeals:[75]

"The stress of the appellant's contention is that the 'Squire' was not a completed vessel and therefore was not a subject for a maritime lien. And if the vessel was not so far complete as to come within the range of a general maritime lien it must be admitted that, if there was nothing more, this libel, which is one in rem, would fail for the lack of any lien upon the vessel. But a Michigan statute supplies this lack. Section 2 of chapter 298 of Compiled Laws of 1897 gives a lien upon watercraft constructed or being constructed for, among other things, 'towage.'"

Referring to the decree of the district judge, the court then says:[76]

"The court below seems to have put its decision upon the ground that the 'Squire' was a completed vessel ready to proceed in its business of navigation on being supplied with certain incidentals which were not a substantive [substantial?] part of the ship. We are not disposed to controvert that conclusion. But the condition of the 'Squire' puts her upon debatable ground and we prefer to rest our own decision upon the presence of the local statute. The libel is wide enough to enable the court to grant relief upon either ground."

The evidence seemed to warrant the finding of the lower court that the "Squire" was a "vessel" within the meaning of the maritime law. But the upper court having some doubt about the question of fact *preferred* to affirm the decree of the District Court on the basis of the local state statute, which gave a lien for towage on watercraft "constructed or *being* constructed"; thus, in effect, holding that a state legislature may create a maritime lien which the federal courts will enforce upon a vessel so incomplete as not to be subject to the maritime jurisdiction, a most extraordinary result for a court of admiralty to reach. If the "Squire" was not a vessel within the meaning of the maritime law, the lien for towage given by the state statute could be enforced, if at all, in the state courts alone, and if she was, as the district judge thought, a completed vessel, then it is submitted that the state statute was not operative inasmuch as the subject is covered by the general maritime law. The statutes of the states relating to repairs, supplies, and other necessaries were passed and enforced by the federal courts

[75] 176 Fed. 499, 501.

[76] 176 Fed. 499, 502.

to remedy a supposed defect in the general maritime law, it being assumed by Mr. Justice Story that the general law provided no lien for such necessaries when furnished in the home port. But the Supreme Court of the United States has never said that the general maritime law gave no lien for towage or similar services rendered in the home port of the vessel. No suggestion has been made by that court of a defect in the maritime law in that particular, and the necessity for a municipal law upon the subject, as in the case of maritime "necessaries," has not therefore existed.

It cannot be doubted that Congress has the power, under its authority to regulate the maritime and admiralty jurisdiction, to supersede the state statutes in so far as they attempt to confer liens for maritime services, but this should not be necessary; for the courts ought not to have difficulty in recognizing the distinction between what belongs to the general maritime law and what the states can do in the field not covered by that law. Let us hope that the new federal statute will be of assistance in making the line between the two clearer in the future.

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